RECEIVED by MSC 8/15/2017 9:45:27 AM

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 156180

DORIAN LAMARR PRICE,

Defendant-Appellant.

Court of Appeals No. 330710
Lower Court No. 15-004825-01-FC

The People's Brief in Opposition to Defendant's Application for Leave to Appeal with Appendices A and B

Kym L. Worthy
Prosecuting Attorney
County of Wayne

Jason W. Williams
Chief of Research
Training and Appeals

Thomas M. Chambers P 32662
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5749

RECEIVED by MSC 8/15/2017 9:45:27 AM

Table of Contents

RECEIVED by MSC 8/15/2017 9:45:27 AM

Argument

RECEIVED by MSC 8/15/2017 9:45:27 AM

Table of Authorities

Cases

Michigan

RECEIVED by MSC 8/15/2017 9:45:27 AM

RECEIVED by MSC 8/15/2017 9:45:27 AM

Federal Courts

United States Supreme Court

Michigan Statutes

Michigan Court Rules

RECEIVED by MSC 8/15/2017 9:45:27 AM

Counterstatement of Jurisdiction

The People accept the Statement of Jurisdiction set forth by Defendant.

RECEIVED by MSC 8/15/2017 9:45:27 AM

Counterstatement of Questions Involved

I. Convictions for both assault with intent to do great bodily harm and felonious assault are not inconsistent or violative of double jeopardy even if both apply to the same assault. Here, Defendant was convicted of both assault with intent to do great bodily harm and felonious assault. Are Defendant's convictions inconsistent or do they violate double jeopardy?

The People answer no.
Defendant answers yes.
The trial court was not asked to address this question.

II. To prevail on a claim of ineffective assistance of trial counsel, a defendant must not only show that his trial counsel's performance was deficient, but also that there is a reasonable probability that a different result would have ensued but for the deficient performance of trial counsel. It is likely that had Defendant's trial counsel moved for a directed verdict of acquittal as to the felon in possession charge, due to the prosecutor's failure to present evidence of Defendant's criminal record, the trial court, which has the discretionary power to allow the reopening of proofs, would have allowed the prosecutor to reopen her proofs. Has Defendant established that there is a reasonable probability that he would have been acquitted of the felon in possession charge had his trial counsel moved for a directed verdict as to that charge?

The People answer no.
Defendant answers yes.
The trial court was not asked to address this question.

RECEIVED by MSC 8/15/2017 9:45:27 AM

Counterstatement of Facts

Defendant was charged with the following offenses: (1) assault with intent to murder, in violation of MCL 750.83, pertaining to complainant Clyde Beauchamp; (2) assault with intent to do great bodily harm, in violation of MCL 750.84, pertaining to the same complainant; (3) felonious assault, in violation of MCL 750.82, pertaining to the same complainant; (4) felon in possession of a firearm, in violation of MCL 750.227; and (5) felony firearm, in violation of MCL 750.227b.

Defendant was convicted following a waiver (bench) trial before the Honorable Richard M. Skutt of assault with intent to do great bodily harm, felonious assault, felon in possession of a firearm, and felony firearm.

Waiver Trial – Day One

Testimony and evidence

The evidence at trial included the following:

Prosecution

Clyde Beauchamp

Clyde Beauchamp testified that on September 29, 2014, he was in the area of 4112 Neff in the City of Detroit (Waiver Trial Transcript, Vol I, 8). He was there that day taking care of some property for a guy who he did property management for (8). The guy's name was Tommy (8). Tommy owned four properties on Neff (8). What he was doing at 4112 Neff was redoing the inside of the house (8). He had been there for about two weeks (9).

While he was at 4112 Neff during that time, he came into contact with Defendant on September 26, a Friday (9). He had never seen Defendant before that day (9). He started out for

RECEIVED by MSC 8/15/2017 9:45:27 AM

Neff at around 8:30 a.m. (9). He first stopped to check on one of the other houses on Neff that he was working on, where he was redoing the sink (9). When he got to this house, Defendant was walking down the middle of the street with his girlfriend and his daughter and another person (9). He (Beauchamp) parked his truck and got out of it (9). Defendant said something to the effect of if he ever said one more thing to his auntie or his sister, he was going to beat his ass (10). He responded to Defendant that he did not even know him (9-10). He then got back in his truck and drove down to 4112 Neff, where he was working (10).

On the following Monday, September 29, he got to 4112 Neff at around 9:00 a.m. (10). He then left to go get materials and did not get back until 3:30 or 4:00 p.m. (10). He had left Joey, a person who worked for him, finishing up on the back part of the roof (10). As he was coming back to 4112 Neff, heading south on Neff, he noticed Defendant on the porch of a house on the right hand side of the street (11). He watched Defendant out of his rearview mirror and saw Defendant come off of the porch and start walking south on Neff, towards the house that he was working on (11-12). When he got to 4112 Neff, he pulled up into the driveway (12). Joey was sitting in the driveway with his girlfriend (12). When he (Beauchamp) got out of his truck, he said to Joey, "Here come Dorian," referring to Defendant (12). He had found out Defendant's name between the 26th and this date (12).

By that time, his own girlfriend had pulled up into the driveway (12). He sat down and talked to her for a minute (12). Then, as Defendant continued to approach, he (Beauchamp) went to the back of his truck, got his rifle, put it on the seat of his truck, and just stood there talking to his girlfriend (12-13). When Defendant got to within three or four houses, he picked his rifle up and put it behind his right leg (13). At that point, he was standing in front of his truck in the driveway

RECEIVED by MSC 8/15/2017 9:45:27 AM

(13). He felt threatened by Defendant, which was why he had his rifle behind his leg, because on the previous Friday, Defendant had said that he was going to come back with a gun (13).

When Defendant got to within 35 or 40 feet, Defendant pulled out a gun (13). Defendant was wearing a black hoodie, and Defendant pulled the gun out of the right pocket of the hoodie (13-14). When Defendant pulled his gun out, he (Beauchamp) pulled his rifle up (14). Just then, at the house next door to 4112 Neff, he saw somebody duck his head out of the house (14). This somebody was the young man who lived in the house next door (14). He then heard the sound of a gun being racked (14). He believed that the young man next door was the brother of Defendant's girlfriend (14).

Defendant had his gun pointed at him (Beauchamp), and he had his rifle pointed at Defendant (15). When he heard the gun being racked at the house next door, he said, "The first person I'm going to shoot is the – if you stick your head out the door" (16). He (Beauchamp) turned his head toward the porch of the house next door (16). As he did that, Defendant fired three shots at him (16). The first shot hit him, and he returned fire (16). None of his shots hit Defendant (18). He knew this because he saw Defendant run behind a tree and then run to a six-foot privacy fence that led into a dead-end street (18). It was at that point that he realized that he had been hit in the chest (18). The bullet had struck him in the area of his chest which was about an inch and a half from his heart (18). After he realized that he had been shot, he turned to the house next door to see if the young man was going to come out and shoot him (19). When the young man did not come out, he put his rifle back in his truck and he himself got in his truck and pulled out of the driveway (19).

The tailgate of his truck was open, and as he pulled out, two of his roofing guns fell out of the truck bed (19). He yelled for Joey to get the roofing guns, and he closed his tailgate (19). He

RECEIVED by MSC 8/15/2017 9:45:27 AM

then drove north on Neff (19). His rifle was on the front seat (19). When he got further up Neff, he stopped at the house of Robert, a person he knew, and he told Robert to give the rifle to Ziggy, another person he knew who lived on Neff, and who did work for him (19-20).

He then drove himself to St. John's Hospital, where he was kept for three days (21). After he was released from the hospital, he had contact with the police (21). He voluntarily turned his rifle over to them (21).

On cross-examination, Beauchamp testified that he had never had an issue with the people who lived in the house next door to 4112 Neff until September 26 (23). He testified that somebody had come into 4112 Neff and had disassembled the hot water tank and the furnace (23). Somebody told him that the young man who lived next to 4112 Neff, Traqwan Davis, was the person who had done it (23-24).

He testified that at the point that he moved his rifle from the bed of his pickup truck to the front seat of his truck, he had not seen Defendant with a gun (30). He also testified that at the point when he took the rifle out of his truck and held it behind his right leg, Defendant had not pulled out a gun (32).

He testified that while he was standing there with the rifle behind his right leg, he saw the young boy go into the house next door (33). The boy did not say anything to him, nor did he see the boy with any weapon in his possession (33). The boy went in the house and stayed in the house until he (the boy) stuck his head out (33). Before the boy stuck his head out, however, he (Beauchamp) heard a gun being racked (34). When he heard the sound of a gun being racked, Defendant had already pulled his own gun out, and he had already raised his rifle (34). He reiterated that he (Beauchamp) then said, "If anybody stick their head out that door, then that's where I'm

RECEIVED by MSC 8/15/2017 9:45:27 AM

firing first" (36). It was then that Defendant fired three shots (37). Defendant's first shot hit the house (37). It was Defendant's third shot that hit him in the chest (37). After Defendant fired this third shot, he (Defendant) ran, and he himself fired three shots from his rifle, hitting the tree and the fence (37-38).

The reason that he gave his rifle to Ziggy was because he could not take it to the hospital (38). Ziggy was standing in front of Robert's house (38).

Discussion relative to video

After defense counsel concluded his cross-examination of Beauchamp, the prosecutor advised the court that her officer in charge had informed her that he had just received a video taken at the time of the incident, which was on Facebook (Waiver Trial Transcript, Vol I, 30). She explained that had she received this video earlier, she would have turned it over to defense counsel (39-40). She asked that the video be admitted into evidence (40).

Defense counsel objected, claiming unfair surprise (40-41).

The trial court ruled that it would allow the video into evidence conditionally, but if it turned out that the complainant had intentionally secreted it until the last minute, it would be suppressed (42-43).

Testimony relative to video

Detroit Police Detective Marcus Jackson

Detroit Police Detective Marcus Jackson testified that he was the officer in charge of this case (Waiver Trial Transcript, Vol I, 44). He testified that he had been made aware that there may be video footage of this incident a couple of days after the incident (44). He heard this from the complainant, Mr. Beauchamp (44). Beauchamp told him, however, that he did not know who had

RECEIVED by MSC 8/15/2017 9:45:27 AM

the video, just that it was on social media (44-45). Beauchamp could not give him any name or any way to find it (44-45). He (Detective Jackson) tried looking on the social network, that being Facebook, but he could not find the video (45).

Then, just this morning (the first day of trial), Beauchamp informed him that he could find out where the video could be found on Facebook (45). Beauchamp told him that he would have to call somebody, and that person could send him the link of where it could be found (45). This all happened in the witness room of the courtroom (45). Beauchamp then made the call, and consequently, he (Detective Jackson) received the video (46).

Clyde Beauchamp (recalled)

Beauchamp was recalled to the stand and testified that when he met with the trial prosecutor a few weeks prior to this trial, he told her that a video of the incident existed (Waiver Trial Transcript, Vol I, 48). She (the trial prosecutor) had his cell phone in her possession at that time (48). He could not, however, provide the means to access the video on his phone (49). He gave her the name and phone number of the person who had filmed the video, that being Derrick L. Betts, and also some possible Facebook names (49). He had seen the video before, but because he did not have a Facebook account, he could not access it (50). Somebody had sent him the video, but it was in a file in his phone and he did not remember the pass code for the file (50).

He testified that the trial prosecutor informed him that she had checked into the names that he had provided her, and that she had not been able to find the video (51). Then, he told the officer in charge that he was still attempting to find the video, and he was finally able to do so by calling his ex-girlfriend, who was the person who had originally sent him the video (51-52). She had told him that she had erased it from her phone, but then she found out that she had not (52).

RECEIVED by MSC 8/15/2017 9:45:27 AM

The trial court allowed the video to be admitted into evidence (58).

Waiver Trial – Day Two

Testimony and evidence

Prosecution

Clyde Beauchamp (recalled)

Clyde Beauchamp testified that watching the video, which was admitted as People's Exhibit No. 16, he was able to see himself in the video, and he also saw Defendant in the video (Waiver Trial Transcript, Vol II, 5). He (Beauchamp) was the person in the orange shirt (5). Defendant was the person standing in the roadway (5-6), wearing short pants and a black pullover hoodie with a black hat (10).

Beauchamp testified the bullet that hit him in the center of his chest hit the back of his pacemaker and came out in front of his left arm (11). The shot was a sideways shot because, as one could see in the video, he was walking away from the street when the bullet struck him (9-12).

On cross-examination, Beauchamp testified about the incident that occurred three days before the shooting incident, when he first had words with Defendant (19). He reiterated that on that date, he was driving down Neff, and Defendant, his girlfriend, and his daughter were walking down the middle of the street (19). When he (Beauchamp) got out of his truck at one of the properties that he was working on, Defendant turned around and said something to the effect that if he said something else to his auntie, he (Defendant) was going to beat his motherfucking ass (19). His response to Defendant was, "Excuse me, my man. I don't even know you" (19). He (Beauchamp) went in the house to drop some materials off to fix the sink with, and when he came back out, Defendant again said something to him, to which he again replied, "I don't even know you and care

RECEIVED by MSC 8/15/2017 9:45:27 AM

not to know you" (19). When he said that, he (Beauchamp) put his hand on his knife and got back in his truck and drove down to 4112 Neff (19).

When he got to 4112 Neff, he backed his truck into the driveway (19-20). Defendant continued walking down the street with this girlfriend and his daughter, and when he got down to where he was, Defendant started saying more stuff to him (20). Defendant's girlfriend told Defendant that he had the wrong guy, that he (Beauchamp) had actually helped her move from one abandoned house to another (20). This did not seem to dissuade Defendant, and he (Beauchamp) asked Defendant if he wanted to fight (20). Realizing that he (Beauchamp) had already had a heart attack, he (Beauchamp) reached for his knife, and he asked Defendant if he wanted to come over to where he (Beauchamp) was and get some air let out of his ass (20). Defendant's response was, "Oh, you going to bring a knife to a gunfight?" (21).

On redirect examination, Beauchamp testified that when he pulled out his knife on the 26th, he and Defendant were circling each other (23). He did not use the knife then (23). No punches were thrown and nobody physically attacked the other (23).

Detroit Police Detective Marcus Jackson (recalled)

Detective Jackson testified that he went to the scene of the shooting (Waiver Trial Transcript, Vol II, 29). At the scene, he observed three shotgun shells in front of the location of the shooting (30). He was also present when an evidence technician removed bullet fragments from 4112 Neff (30). He also observed himself three bullet holes in the front of 4112 Neff (30-31).

He had been with the Detroit Police for ten years and had been involved in a lot of shooting cases (31). Watching the video, he was able to distinguish between the sounds of five shots and three shots that followed the five shots (31-32). In his opinion, the five shots were fired from a

RECEIVED by MSC 8/15/2017 9:45:27 AM

small caliber weapon, like a handgun, and the three shots which followed were fired from a larger caliber weapon, like a shotgun (32).

Defense

Dorian Lamarr Price (Defendant)

Defendant testified that he was 29 years old (Waiver Trial Transcript, Vol II, 39). At the time of this incident, his sister-in-law lived next to the house where the shooting occurred (39). She lived there with her kids: Traqwan Davis, Brianna Davis, and Little Fred (40). Traqwan was 16 years old (40). They had been living there for three or four years and he visited there often, every day or every other day (40). He lived around the corner from there, on Woodhall (40-41).

The first time that he ever saw Beauchamp was on September 26 (41). What brought his attention to Beauchamp was his nephew, Traqwan (41). As he and his nephew were walking up the street to his sister-in-law's house, his nephew pointed to Beauchamp's truck and said that Beauchamp was the one who had cussed his mother out and had accused him of going into 4112 Neff and taking a hot water tank and furnace out of there (42-43). He saw Beauchamp standing in front of his truck in front of a house on Neff (not 4112), and he told Beauchamp that if he (Beauchamp) ever said anything else to his sister, he would break his jaw (43-44). When he said this to Beauchamp, he (Defendant) was in the street and Beauchamp was talking to somebody while standing in front of his truck (44).

He (Defendant) kept walking towards his sister's house (44). Beauchamp got in his truck and went down to the driveway of the hosue next to his (Defendant's) sister's house (44). When Beauchamp got out of his truck, he (Defendant) saw the handle of something sticking out of the back of Beauchamp's pants (45). He asked Beauchamp what he was doing down there if he did not know

RECEIVED by MSC 8/15/2017 9:45:27 AM

his sister (45). He and Beauchamp got into an argument(45). Beauchamp put his hand behind his back, and he (Defendant) asked Beauchamp if he had a gun (45). Beauchamp responded that he did not need a gun, and then he pulled out a knife with a ten-inch blade (45). He started fighting with Beauchamp, and Beauchamp swung his knife at him and cut him in the hand (46). He did not see Beauchamp again until three days later (46).

On September 29, he (Defendant) was sitting on the front porch of his friend's house on Neff (46). He saw Beauchamp driving down the street (46). He went home to ask his wife where his sister was (47). His wife told him that his sister was at work, and she asked him why he was asking (47). He told her that he had just seen Beauchamp driving down the street (47). He knew that his sister's kids were home alone, and because Beauchamp had threatened them once, he went down there to check on them (47). What Beauchamp had done was, when he was driving by Traqwan, he went slow and pointed his finger at Traqwan as if he had a gun (47). So, he (Defendant) walked down to his sister's (47). In order to get to her house, he had to walk past 4112 Neff (48). He saw Beauchamp coming out of the backyard of 4112 (48). When Beauchamp saw him, he (Beauchamp) ran back into the backyard (48). Once he (Defendant) got to 4112 Neff, he saw Beauchamp standing by the back of his truck with his hand on the bed of the truck (48). He asked Beauchamp why he had run (48). Beauchamp responded that he (Beauchamp) knew that he (Defendant) had not come down there for nothing (48). He told Beauchamp to come out of the backyard and talk to him (48). Beauchamp told him to come back there (49). He told Beauchamp that he was not going to go back there because he (Beauchamp) had pulled a weapon on him once before (49). They argued some more, and then Beauchamp said that he had something for him (49). That was when Beauchamp pulled out a rifle (49). He (Defendant) took a step back (49). Beauchamp pointed the rifle at him

RECEIVED by MSC 8/15/2017 9:45:27 AM

(51). He (Defendant) took another step back, and then he turned around to walk away (51). Beauchamp also turned around to walk off (51). That was when he heard shots ring out (51). He did not know where the shots came from, but he started running away (51). He did not fire the shots (51). He did not even have a gun (51). He was not allowed to carry guns (51). If he were to carry a gun, he would have to do five years in prison (51). He had already done two years in prison for having a gun (51). He did not see Beauchamp shoot his rifle either (52).

On cross-examination, Defendant acknowledged that he had three prior convictions for receiving and concealing stolen property (53).

On redircct, Defendant testified that he was not claiming that he fired in self-defense inasmuch as he did not have a gun (64).

Trial Court's Findings of Fact and Verdict

> THE COURT: Okay, we're back on the Record in People versus Dorian Price.
>
> In this matter the Defendant is charged with the following Counts: assault with intent to murder or the lesser of assault with intent to do great bodily harm plus (sic) the murder, felonious assault or assault with a deadly weapon, carrying a concealed weapon, felony firearm with a second offense notice and felon in possession of a firearm. The charges are leveled as a fourth habitual offender which makes all – except for the felony firearm-second and the felonious assault potentially life offenses. The felony firearm-second is a mandatory five year sentence and the felonious assault could be increased from four to as much as 15 years.
>
> The testimony of Mr. Beauchamp, the Complainant in this case and Mr. Price, the Defendant in this case, pretty much parallels the initial – or the onset of what occurred on September 26th. Mr. Beauchamp and Mr. Price both indicate that Mr. Beauchamp was stopped in front of a house – several houses north of the 4112 Neff house, when he was approached by Mr. Price who made some

RECEIVED by MSC 8/15/2017 9:45:27 AM

comment to the effect Mr. Beauchamp said: "If you say one more thing to my sister or auntie I'm going to beat your ass." Mr. Price indicated that, "If you don't leave my sister alone I'm going to bust your jaw," but that there was a confrontation that took place at that location among two people who didn't have any previous history with each other.

Mr. Beauchamp believed it had something to do with the situation involving the theft of a hot water heater from another house that he was working on and that word on the street was that – a person who would be the Defendant's nephew, was involved in that incident. Mr. Price indicated that he was told by his nephew that this was the person who had accused him of the theft of that water heater and had made disparaging comments about the woman who is Mr. Price's sister-in-law and that that was the genesis of the initial contact between the two of them.

We didn't get much farther than that back on October 5 , but today it became much clearer that the confrontation on the 26th continued on down to the location of 4112 Neff after Mr. Beauchamp had relocated to that area and that the two of them continued to engage in at least a verbal altercation which became very close to being physical – or actually did become physical depending upon which person you talk to. Both indicated that Mr. Beauchamp had a knife on his right hip and that at some point he pulled that knife out. He indicated – through the intervention of the young lady, that the the police were called and nothing went further. Mr. Price indicated that the two of them got into it and he ended up with a cut in the palm of his left hand which he treated with a gauze pad from a drugstore.

Fast forward to three days later on September 29th. Mr. Beauchamp had a person named Joey who was doing some roofing work at the 4112 Neff address – and went there around nine o'clock in the morning. At some point he left – but it never got clear exactly when he left, and then came back sometime around 3:30 or 4:00 in the afternoon. When he came southbound on Neff off of Warren, he saw the Defendant sitting on a porch on the right-hand side of the street. Again this squares pretty much with what Mr. Price said, that he was sitting on the porch of a friend and saw Mr. Beauchamp's truck arrive in the neighborhood.

He – by that I mean Mr. Price, indicates he then went to his home – which is on the next street over, to talk to his wife about

RECEIVED by MSC 8/15/2017 9:45:27 AM

whether his sister-in-law was home. Then he came down his street to a cut-through that he knew; a cut through over to Neff Street and continued to walk south on Neff. Mr. Beauchamp indicated that as he drove down the street he saw Mr. Price following him down the street and that when he got up to 4112 Mr. Beauchamp made a comment to Joey and his girlfriend who were sitting in Joey's truck in the driveway next door to 4112 - Joey having just finished the roofing work that, "Here comes Dorian."

As he saw Mr. Price coming down the street he went to the back of his truck – which would have been by the back of the house at 4112, removed a .410 shotgun and placed it on the passenger – through the passenger side door, in the truck which was backed into the driveway. So it would be on the south side of the driveway. He indicated that at some point when Mr. Price got three or four houses away he went and got the shotgun out of the truck and held it behind his right leg.

Now his testimony last week was that the Defendant had said that he would get a gun and come back. Today he said to the effect that – when he pulled the knife Mr. Price said, "You're going to bring a knife to a gunfight?" He indicated when Mr. Price got about 35 to 40 feet away – and this is where the video sort of comes into play. We see Mr. Price coming down the street. We see Mr. Price on the opposite side of the street, about a house away from where Mr. Beauchamp is standing. Mr. Beauchamp is standing in the driveway with the weapon at his side.

It appears at some point that Mr. Beauchamp raised the rifle – or the shotgun. He indicated that when he saw Mr. Price – in his testimony on the fifth, that when he saw Mr. Price pull the gun from the right front side of his hoodie that he pulled – raised his shotgun and pointed it at Mr. Price. Mr. Price indicates he did not have a gun at that time.

Mr. Beauchamp indicates that as they were sort of in the standoff position he heard what he believed to be the racking of a semi automatic weapon coming from the door area of the house next door which would be the sister-in-law's house where the nephew – I guess two nephews and the niece resided, and made some comment to the effect that the next person that poked their head out of the house would be the first person shot. At or near that point he turns and starts to move up the driveway toward the house. Right after

RECEIVED by MSC 8/15/2017 9:45:27 AM

he turned you hear five shots. Shortly thereafter you hear three shots which Mr. Beauchamp says was his returning of fire, indicating that he had been hit by one of the shots.

The hospital records indicate that he was shot in the area he said – in the left pectoral area; entering in the chest area, not hitting any vital organs, passing behind the pacemaker – apparently touching it, and coming out of the left armpit area. He indicates his shots were fired across the street at an angle – which would be where a fence is, so that the shots hit the fence and the tree that are located across the street.

There are bullet holes in the – the photographs show that there were three shotgun shells which would have been ejected from the shotgun. It was unclear from the testimony exactly; when I asked him if they were buckshot, slugs or bird shot, he didn't know. He said slugs at one point but without further – we don't know. We do know that it was a shotgun, it was fired three times and it was fired in the direction of the area where Mr. Price was last seen to have been standing.

Certainly the video is not conclusive of anything. It does support the time line of what Mr. Beauchamp testified to in terms of as he was turning to walk away the shots were fired – or walked towards the house or turning his attention towards the house the shots were fired and that he fired three shots in return. I don't think it would be possible for him to have fired five shotgun shots without having – without recovering the shells. So all of the physical evidence confirms – in terms of what he said, in terms of the shots being fired except for the number. Hospital records – he said he only remembered one shot. When he testified here he said he remembered three shots. The video clearly shows there were five shots fired.

Interestingly – and I always think this is an important thing; that history given at the time of the admission to the hospital comports with the testimony on October fifth and the testimony given by Mr. Beauchamp today. He indicates that there was a confrontation, three days later there was the shooting. Now it certainly doesn't go into the detail that one might like or that one might expect from a police report – and I know history taken in hospitals is not always the most accurate, but it does comport with the testimony that was given here. I'll just say that I remember

RECEIVED by MSC 8/15/2017 9:45:27 AM

representing somebody with gunshot wounds and picking up the Receiving report that said " . . . no known trauma –", it started out with. So – and my neighbor was the assistant director who took that and we had a long discussion that night.

Today he also indicated that the Defendant had made some statement to Joey about, "I've got a bullet in here for you as well." The Defendant's position is that he did not have a weapon. That he was merely going down – because there had been a previous confrontation between his nephew and Mr. Beauchamp, to make sure that the kids were okay. He wasn't really able to explain – other than saying he just wanted to put to rest the problem between the two of them, why he didn't go in the house to check on the kids or why he stayed on the opposite side of the street. As I indicated there are – if I remember; there were two bullet holes – maybe three bullet holes, but there were two that had closeup pictures of shots that had struck the house at 4112. Both of which would indicate that the gun was fired from an angle that would have been in the general area where Mr. Price was standing. Because you can see on the entry to those bullet holes that there is a dent – a scraping on the right side of them that indicates that the bullet went in at an angle rather than straight in with just the circular impression that you would otherwise expect.

Mr. Price indicates he has no idea who would have fired the gun. As I indicated the camera can't be conclusive. There is a point at it where it looks like Mr. Price is raising his arm right around the time it looks like the point where Mr. Beauchamp is lifting the shotgun, but it's so jerky and it's – the person that's taking this – I assume iPhone or photograph, is so excited about what's going on the camera is jerking all over; going – not ever really focusing on exactly what's going on. But the shot would have – the shots strike the house at that angle and – to strike Mr. Beauchamp at the angle would have had to have come from the general area where Mr. Price was standing as far as I can tell from viewing the tape, looking at the angle of the photographs that are on it.

Nobody talked about anybody else being in that general area. Mr. Price would have had to have seen somebody or the shots would had have to have been so close to where he was standing that he

RECEIVED by MSC 8/15/2017 9:45:27 AM

would have known something was going on and he – I can't credit his testimony.

Now the elements of assault with intent to murder is first that the defendant tried to physically injure another person, had the ability to cause the injury – or believed he did, and intended to kill the person. My reading of this is that the – this is a specific intent crime unlike basically that – if successful, results in first degree murder where with second degree murder you have different states of mind that are available; intent to kill without premeditation. You have creating a very high risk of death or great bodily harm – knowing that the likelihood of that, and acting with that. Assault with intent to do great bodily harm/less than murder, has the same first two elements; that you have to have an intent to physically injure another person and at the time of the assault the defendant had the ability to cause the injury – or believed that he had the ability and the intent was to cause great bodily harm – which is any physical injury that could seriously harm the health or function of the body.

I think – given the confrontation on the 26th, the fact that Mr. Price basically marched down and did not follow through on what he said was his mission that day – which was to make sure the kids were okay. If he wanted to bury the hatchet with Mr. Beauchamp as he suggests, it would have been very easy to check on the kids first and then go out and say, "We've got to deal with this because we live in the neighborhood."

I think there was an attempt to physically injure him. That he had the ability to do so because I do believe that he had a firearm with him. I can't say that this is a first degree murder type situation. I think that it is – there may have been an intent to kill but it's more likely that there was an intent to – particularly when you couple with the fact that Mr. Beauchamp had a rifle – what appeared to be a rifle – a shotgun, and was ready to rumble himself, that the intent was more to cause great bodily harm and I'm going to find him guilty of the lesser offense of great bodily harm.

The assault with a dangerous weapon is just the attempt to commit a battery or placing a person a reasonable fear of an immediate battery with the intent to injure – and the ability to do so, and it's committed with a dangerous weapon. It is no longer considered a necessary lesser included offense so he's found guilty of that Count as well because there is – for the same reasons I

RECEIVED by MSC 8/15/2017 9:45:27 AM

indicated; there was an assault, there was a weapon used, there was a firing of the weapon at Mr. Beauchamp.

The carrying a concealed weapon I find him guilty of because the testimony is that the weapon did not become visible until the Defendant was within 35 to 40 feet which would indicated that it was not something that was necessarily visible. Mr. Beauchamp testified that the hands were in the pockets of the hoodie, Mr. Price testified that he kept his hands in the pocket of the hoodie that would indicate that it was covered up at least in a substantial portion. So I find him guilty of that.

Felon in possession of a firearm I find a little bit harder because I don't think we ever stipulated to that. There was however testimony that he had previously been convicted of a felony – and admitted to by the Defendant, of receiving and concealing stolen property which would have the same prohibition against possession, owing, using, transporting or selling a firearm - purchasing or selling a firearm in the State of Michigan. So I – and I'm trying to – he did admit to possession of stolen property; a motor vehicle, and he did testify that he'd previously been convicted of felony firearm. Again both of those, I think, would serve as a predicate felony for a felon in possession. So I will find him guilty of felon in possession of a firearm and felony firearm because a firearm was used in the two assaultive crimes – and the felon in possession Count.

I want to thank Counsel for their professionalism in putting this together. I know that we had a little bit of a fit and start because of the latest of the actual – discovery of actual video in this case. I think that I tried to accommodate the Defense in that because – by adjourning this and allowing the appointment of Mr. Bruce as an investigator to assist Mr. Weitzman so that – even though there was some level of surprise, there was the ability to address that. As I indicated, I don't think the video was conclusive. I think it supports the time line on some bases, but it is not a primary basis of the decision that I'm entering into today.

(Waiver Trial Transcript, Vol II, 81-92).

RECEIVED by MSC 8/15/2017 9:45:27 AM

Argument

I. Convictions for both assault with intent to do great bodily harm and felonious assault are not inconsistent or violative of double jeopardy even if both apply to the same assault. Here, Defendant was convicted of both assault with intent to do great bodily harm and felonious assault. Defendant's convictions are not inconsistent nor do they violate double jeopardy.

A) Defendant's Claim

Defendant's first claim is two-fold: (1) that the trial court's verdict finding him guilty of assault with intent to do great bodily harm and felonious assault constitutes an inconsistent verdict, which a trial court, sitting as the trier of fact, is not at liberty to render, and (2) that his convictions of both assault with intent to do great bodily harm and felonious assault violate the double jeopardy protection against double punishments.

B) Counterstatement of Standard of Review

Generally, this Court reviews de novo whether a trial court's verdict in a bench trial is inconsistent or whether the verdict violated double jeopardy.[1] Defendant failed to raise in the lower court his challenges to being convicted and sentenced for both assault with intent to do great bodily harm and felonious assault. As such, Defendant's claims are unpreserved for appeal.[2]

---

[1] *People v Tombs*, 472 Mich 446, 462-463; 697 NW2d 494 (2005), overturned on other grounds by *People v Nix*, 479 Mich 112; 734 NW2d 548 (2007); *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

[2] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

RECEIVED by MSC 8/15/2017 9:45:27 AM

In order to preserve an issue for appeal, "a party generally must object at the time of admission,"[3] "and specify the same ground for objection that it asserts on appeal."[4] Issues not properly preserved in the trial court cannot be raised on appeal absent compelling or extraordinary circumstances.[5] The Supreme Court has adopted the federal plain error standard of review for all unpreserved error, be it constitutional or nonconstitutional.[6] When the defendant has failed to raise an objection, it is the defendant who bears the burden of persuasion regarding prejudice.[7]

Under the plain error standard of review, the defendant must meet a three step test: (1) an error must have occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights.[8] The third requirement requires that the defendant show that the error affected the outcome of the trial court proceedings. Even if the defendant meets all three parts of the test, this Court will vacate the conviction only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

---

[3] *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

[4] *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

[5] *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

[6] *People v Carines*, 460 Mich 750, 752; 597 NW2d 130 (1999).

[7] *United States v Olano*, 507 US 725; 113 S Ct 1770, 123 L Ed 2d 508 (1993); *Grant*, *supra*.

[8] *Olano*, supra.

RECEIVED by MSC 8/15/2017 9:45:27 AM

C) The People's Position

i) Inconsistent Verdicts.

Defendant argues that the trial court rendered an inconsistent verdict when it found him guilty of both assault with intent to do great bodily harm and felonious assault. A jury may render apparently illogical or inconsistent verdicts.[9] However, a trial court conducting a bench trial may not enter a plainly inconsistent verdict.[10] For verdicts to be inconsistent, the factual findings underlying the verdicts must be inconsistent.[11] If there is an interpretation of the evidence that logically explains the trial court's findings, the verdict is not inconsistent.[12]

Defendant's claim relies upon the language of MCL 750.82 which states in relevant part:

> a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon *without intending to commit murder or to inflict great bodily harm less than murder* is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00 or both. (Emphasis added)

Defendant contends that, to convict him of felonious assault, the trial court was required to make a finding that he did not have the intent to do great bodily harm. Because assault with intent to do great bodily harm required the trial court to find that he had the intent to do great bodily harm

---

[9] *People v Wakeford*, 418 Mich 95, 109, n 13; 341 NW2d 68 (1983).

[10] *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003).

[11] *People v Smith*, 231 Mich App 50, 53; 585 NW2d 55 (1998).

[12] *Tombs*, *supra,* 472 Mich at 462-463.

RECEIVED by MSC 8/15/2017 9:45:27 AM

and felonious assault required the trial court to find that he did not have the intent to do great bodily harm, Defendant asserts that convictions for both offenses are inherently inconsistent.

Defendant's argument is built around the false proposition that a required element of felonious assault is that the defendant did not have the intent to do great bodily harm. Even before the Michigan Penal Code was enacted in 1931, the crime of felonious assault existed punishing those who assault another person with a dangerous weapon, "but without intending to commit the crime of murder, and without intending to inflict great bodily harm less than the crime of murder."[13] Felonious assault was created to be among the range of criminal assaults, above simple assault and battery and below assault with intent to do great bodily harm less than murder.[14] The Legislature was able to fit this criteria by adding the element of a dangerous weapon to the lower charge of simple assault and battery and eliminating the element of an intent to do great bodily harm from the higher charge. In its long existence, the language defining the crime has been repeatedly examined to divine the necessary elements of the offense. As a result, those necessary elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place victim in reasonable fear or apprehension of an immediate battery.[15]

In creating MCL 750.82, the Legislature criminalized all acts of using a dangerous weapon to assault another person. The only intent necessary under the statute is the specific intent to either injure the other person or make the person reasonably fear an immediate battery. Once that intent

---

[13] CL 1915, § 15228.

[14] *People v Warner*, 201 Mich 547, 553; 167 NW 878 (1918).

[15] *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

RECEIVED by MSC 8/15/2017 9:45:27 AM

is established beyond a reasonable doubt, the prosecution has no further burden to disprove that another intent existed. Defendant's argument that such a burden does exist asks this Court to punish the prosecution for proving too much. Should the prosecution go beyond the requirements of the law and prove that the defendant not only had the intent to injure or make a person reasonably fear an immediate battery but intended to kill or cause great bodily harm, Defendant believes that he should therefore be entitled to an acquittal on the charge of felonious assault.

The cited language of MCL 750.82 was intended to remove the intent to murder or to do great bodily harm as necessary elements of the offense, not add the absence of those intents as a "negative element." The language "without intending to commit murder or to inflict great bodily harm less than murder" is language of limitation intended only to distinguish the statutory offense from those above it in the range of assaults by removing the intent to murder or do great bodily harm as required elements of felonious assault. The limiting language does not create a burden on the prosecution to disprove that the defendant did not have the stated intents.

The Legislature's use of limiting language as a way to distinguish one offense from another without creating a negative element that must be established, or rather disproved, beyond a reasonable doubt is not uncommon. For example, the intentional discharge of a firearm causing death statute, MCL 750.329, provides that "A person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally *but without malice* at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death" (emphasis added). In *People v Doss,*[16] the defendant argued that the absence of malice was a necessary element under the statute. If malice was shown, the offense could not be made out. This Court disagreed:

---

[16] *People v Doss*, 406 Mich 90; 276 NW2d 9 (1979).

RECEIVED by MSC 8/15/2017 9:45:27 AM

> Elements are, by definition, positive. A negative element of a crime is a contradiction in terms . . . . In the instant case, 'without malice' is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt. Malice or "malice aforethought" is that quality which distinguishes murder from manslaughter . . . . While the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt."[17]

Similarly, in *People v Holtschlag,*[18] this Court rejected the notion that felonious conduct cannot support the offense of involuntary manslaughter simply because one method of commission of that offense is where the killing of another occurs "during the commission of an unlawful act that is not a felony."

The trial court's verdicts are logically and factually consistent to each other. The trial court found that Defendant used a dangerous weapon to assault the victim with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery. Not only did Defendant have the required intent to commit felonious assault, but he had the additional intent to do great bodily harm. As shown, the language "but without intending to commit the crime of murder, and without intending to inflict great bodily harm less than the crime of murder" was intended to distinguish the offense of felonious assault from the offenses of assault with intent to murder and assault with intent to do great bodily harm. The cited language was not intended to create a negative element that must be established beyond a reasonable doubt. To find Defendant guilty of felonious assault, the trial court was not required to make a factual finding that he did not act with

---

[17] *Doss, supra,* 406 Mich at 99.

[18] *People v Holtschlag*, 471 Mich 1; 684 NW2d 730 (2004).

RECEIVED by MSC 8/15/2017 9:45:27 AM

the intent to do great bodily harm. Thus, the trial court's finding that Defendant had the intent to do great bodily harm was not legally or factually inconsistent with its conclusion that Defendant committed a felonious assault. The trial court was not barred from finding Defendant guilty of felonious assault simply because it factually found that Defendant had the intent to do great bodily harm less than murder.[19]

ii) Double Jeopardy

Defendant next claims that his convictions for both felonious assault and assault with intent to do great bodily harm violate double jeopardy. Both the United States and Michigan Constitutions protect defendants from being placed in jeopardy or punished multiple times for a single offense.[20] Cumulative punishment may be permitted when clearly intended by the Legislature.[21] Where the legislative intent is not clearly expressed, this Court has adopted the "same elements test" set out in *Blockburger v. United States*[22] as an method of determining whether cumulative punishment was intended.[23] This test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied,

---

[19] Another panel of the Court of Appeals addressed this very same issue and arrived at the same resolution that the Court of Appeals panel did in this case. *People v Jones,* unpublished opinion per curiam of the Court of Appeals, decided January 17, 2017 (Docket No. 329185), lv den – Mich –; – NW2d – (Docket No. 155435; July 25, 2017) (a copy of this Opinion is attached as **Appendix A**); but see *People v Davis,* – Mich App –; – NW2d – (Docket No. 332081; July 13, 2017).

[20] *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1(2004).

[21] *Ohio v Johnson*, 467 US 493, 499, fn 8; 104 S Ct 2536, 2541, fn 8; 81 L Ed 2d 425 (1984).

[22] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

[23] *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007).

RECEIVED by MSC 8/15/2017 9:45:27 AM

notwithstanding a substantial overlap in the proof offered to establish the crimes."[24] The fact that both charges relate to and grow out of one transaction makes no difference in determining whether they are the "same offense" under the Fifth Amendment.[25]

Defendant once again relies upon the language of MCL 750.82 to support his argument. Defendant contends that the absence of the intent to do great bodily harm is a required element of felonious assault. By making the absence of the intent to do great bodily harm a necessary element, Defendant believes that the Legislature was stating its intent "that an assault committed with the intent to do great bodily harm less than murder (or with the intent to murder) should not be punished as felonious assault."

Defendant's premise is flawed in that the Legislature's choice of language did not create a negative element requiring the prosecution to disprove that the defendant had the intent to murder or do great bodily harm. The language was included only to distinguish felonious assault from the higher offenses by eliminating the necessity of proving the intent to murder or do great bodily harm. The absence of an intent to murder or do great bodily harm is not an element of felonious assault. If Defendant assaulted another person with a dangerous weapon with the intent to injure that person, he is guilty of felonious assault. Defendant is not any less guilty of felonious assault simply because his intent to injure was an intent to kill or cause great bodily harm. The statutory language illustrates the Legislature's intent to hold persons responsible for assaulting others with dangerous weapons even if there is no intent to murder or do great bodily harm. The cited language does not

---

[24] *Iannelli v United States*, 420 US 770, 785, fn 17; 95 S Ct 1284, 1293, fn 17; 43 L Ed 2d 616 (1975).

[25] *Carter v McClaughry*, 183 US 367, 394-395; 22 S Ct 181, 192-193; 46 L Ed 236 (1901).

act as a statutory bar to convictions for both felonious assault and assault with intent to murder or assault with intent to do great bodily harm.

This Court has already determined that double jeopardy does not bar convictions for both felonious assault and assault with intent to do great bodily harm. In *People v Strawther*,[26] this Court found that the lower court erred in concluding that the defendant's convictions for both assault with intent to do great bodily harm and felonious assault violated double jeopardy. "Because the crimes have different elements, the defendant may be punished for each."[27] While assault with intent to do great bodily harm requires the intent to do great bodily harm, felonious assault does not. And, while felonious assault requires the use of a dangerous weapon, assault with intent to do great bodily harm does not. Defendant's convictions for both do not violate double jeopardy.

---

[26] *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007).

[27] *Id.*; see also *People v Strickland,* 293 Mich App 393, 401; 810 NW2d 660 (2011).

RECEIVED by MSC 8/15/2017 9:45:27 AM

RECEIVED by MSC 8/15/2017 9:45:27 AM

II. To prevail on a claim of ineffective assistance of trial counsel, a defendant must not only show that his trial counsel's performance was deficient, but also that there is a reasonable probability that a different result would have ensued but for the deficient performance of trial counsel. It is likely that had Defendant's trial counsel moved for a directed verdict of acquittal as to the felon in possession charge, due to the prosecutor's failure to present evidence of Defendant's criminal record, the trial court, which has the discretionary power to allow the reopening of proofs, would have allowed the prosecutor to reopen her proofs. Defendant has not established that there is a reasonable probability that he would have been acquitted of the felon in possession charge had his trial counsel moved for a directed verdict as to that charge.

A) Defendant's Claim

Defendant's second claim is that his trial counsel was ineffective in not moving for a directed verdict of acquittal as to the felon in possession charge where the prosecution's proofs failed to present evidence in its case in chief sufficient to establish this charge before putting on evidence in the defense case that did establish the charge.

B) Counterstatement of Standard of Review

The People accept Defendant's statement of the standard of review.

C) The People's Position

As Defendant aptly notes, to prevail on a claim of ineffective assistance of trial counsel, he must not only show that his trial counsel's performance was deficient, but also that there is a reasonable probability that a different result would have ensued but for the deficient performance of trial counsel.

Defendant has not shown a reasonable probability of a different result had his trial counsel moved for a directed verdict on the felon in possession charge. Had trial counsel made such a motion, it is likely that the trial prosecutor, realizing the oversight in not presenting evidence of

RECEIVED by MSC 8/15/2017 9:45:27 AM

Defendant's ineligibility to possess a firearm, due to his criminal record, would have moved to reopen her proofs to establish that fact. And it is likely, given the trial court's discretion to allow the reopening of proofs,[28] that the trial court would have allowed the reopening of proofs. The prosecutor's failure to present evidence of Defendant's prior criminal record was an obvious oversight, and Defendant was undoubtedly aware of the charge against him.[29] Indeed, on direct examination, Defendant readily acknowledged that he was not supposed to be carrying a firearm due to his criminal record. "Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved." [30]

---

[28] *People v Keeth,* 193 Mich App 555, 560; 484 NW2d 761 (1992).

[29] See *People v Bryant,* unpublished opinion per curiam of the Court of Appeals, decided April 12, 2007 (Docket No. 265908), p 8 (a copy of this Opinion is attached as **Appendix B**).

Pursuant to MCR 7.215(C)(1), the People are citing this unpublished opinion because no published opinion comes as close to being analogous to the situation presented here as this case does.

[30] *Id.*, citing *People v Callon, supra*, 256 Mich App at 328.

RECEIVED by MSC 8/15/2017 9:45:27 AM

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

Kym L. Worthy
Prosecuting Attorney
County of Wayne

Jason W. Williams
Chief of Research
Training and Appeals

/s/ Thomas M. Chambers
Thomas M. Chambers (P 32662)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5749

Dated: August 2, 2017